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In The
Supreme Court of the United States

THE BOEING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. BRETT ROBY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT BRETT ROBY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES B. HELMER, JR.*
FREDERICK M. MORGAN, JR.
ROBERT M. RICE
HELMER, MARTINS & MORGAN CO., LPA
105 East Fourth Street, Ste. 1900
Cincinnati, OH 45202
(513) 421-2400

MICHAEL A. HAVARD
PROVOST ★ UMPHREY
490 Park Street
Beaumont, TX 77704

Attorneys for Respondent Relator Brett Roby

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The Court should deny the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit sought by Petitioner The Boeing Company. There was no error below, and there is no conflict among the circuits. The decisions below are consistent with the decisions of this Court and those from other circuits, as well as the text and history of both the False Claims Act and the High Value Items Clause. Nor does this case raise important or unsettled questions regarding the relationship between the Government and its contractors. Rather, the holdings of the trial and appellate courts in this case show no more than that no company – not even Boeing – is above the law.

STATEMENT OF THE CASE

This case comes before the Court in an unusual posture. The parties settled with Boeing agreeing to pay $61.5 million for its actions. But Boeing insisted, as part of the settlement, upon holding back $19 million of the proceeds while it appealed two adverse rulings against it: First, whether a contractual provision of the Federal Acquisition Regulations immunized it from the reach of the False Claims Act. Second, whether Boeing's damages under the False Claims Act for delivering to the Army a helicopter with a defective flight-critical gear which caused the helicopter to crash and be totally destroyed are limited to the $10,000 cost of the gear. These questions were both answered negatively by the district court and the court of appeals in favor of the United States.

Relator Brett Roby was a Quality Assurance Specialist at SPECO, a now-defunct Boeing subcontractor. Mr. Roby brought this False Claims Act case against Boeing and SPECO after learning that Boeing sold defective CH-47D "Chinook" helicopters to the United States Army and took

steps to prevent information regarding that conduct from finding its way to the United States.

During the 1980s, the Army awarded contracts worth about $2,000,000,000 to Boeing for re-manufacture of about 400 Chinooks. The remanufacturing program was a frame-up rebuild of the helicopters which included new drivetrains containing flight-critical gears manufactured to Boeing specifications from a Boeing-proprietary alloy, "Vasco X2-M."

Boeing subcontracted for SPECO to make the gears. Boeing failed to advise SPECO that Boeing's engineers had actual, specific knowledge of certain metallurgical characteristics of Vasco X2-M which made it an inordinately difficult material to process properly. As a result, SPECO-produced gears often contained defects that created a substantial risk that the gears would crack in service. Cracked flight-critical helicopter transmission gears cause crashes.

When Boeing delivered the rebuilt helicopters to the Army, it falsely certified the aircraft as flight-worthy. In fact, many contained defective SPECO transmission gears. At least two of the Vasco gears exploded while helicopters were in flight as a result of defects which were overlooked by both SPECO and Boeing. Through the course of the litigation, many other gears were found to be defective. The Army grounded that portion of its Chinook fleet with SPECO engine-transmission gears, and as part of the settlement below, such gears were replaced.

As part of a settlement agreement, the district court certified for appeal two questions which were resolved against Boeing by both that court and the court of appeals. Both questions concern whether Boeing can be held liable under the False Claims Act for damages unquestionably sustained by the United States as the result of a crash caused by the failure of a Vasco gear. The crash occurred

in January 1991, during the first Gulf war when a recently-delivered, Boeing-remanufactured Chinook crashed in the Saudi Arabian desert. A defective engine-transmission gear exploded sending shards of the gear into the aircraft and resulting in a fuel-fed fire. Because the helicopter was flying at low altitude, the 18 passengers and crew scrambled off, but two soldiers were injured. The helicopter was a total loss, as was all cargo consisting of a truck, a howitzer, and ammunition.[1]

At the outset, we respectfully urge that the Court not be misled by Boeing's attempts to both distance itself from the failures that caused the crash at issue here, and recast the issues on appeal. The stipulated predicate to the questions certified by the district judge is that sufficient evidence existed that Boeing could, absent prevailing on one or the other of the legal questions certified to the court of appeals, be held liable under the False Claims Act *for any amount of damages beyond the cost of the defective gear*.[2] This being so, the fact that the gear which caused

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[1] Though not the subject of this petition, the United States and Relator Roby also alleged that other Chinook crashes have resulted from these defective transmission gears, including one in 1988 in Honduras, causing the deaths of five American servicemen and the total loss of the helicopter; and one in 1993 during a training mission at Fort Meade, Maryland, resulting in over $1,000,000 in damages to the Chinook.

[2] In the Settlement Agreement between Boeing and the United States, Boeing contracted to pay the reserved settlement amount upon a determination that the United States could recover "damages under the False Claims Act flowing from Boeing's claim(s) for payment for the Saudi helicopter that represent the value of the helicopter *(whether it be replacement value, fair market value, contract value or price, or some other measure)* ***rather than just the value of the defective gear[.]*** Settlement Agreement (attached hereto) at p. 11, ¶ 2.h.i. (emphasis added). *Accord United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 640-641 (6th Cir. 2002). This decision is reprinted in Petitioner's

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the crash was made by a subcontractor is irrelevant. Boeing chose and qualified its vendor, specified the exotic gear material, and was responsible for delivery of conforming aircraft. Moreover, Boeing itself contracted to perform annual destructive tests of these vendor-supplied flight-critical gears, but failed to conduct these required tests.

Similarly, Boeing's current claims that the Army "requested" a specific vendor, that the Army "approved" SPECO for this project, and that Army inspectors were "deeply involved" in the quality control process at SPECO (Petition at 9-10) are both irrelevant and misleading. Boeing was no mere assembler, nor was it a disinterested prime contractor which accepted and installed off-the-shelf components while innocent of the problems which plagued their manufacture.

To the contrary, the extensive factual record reflects that Boeing convinced the Army that the flight-critical transmission gears be made from Boeing's proprietary Vasco X2-M alloy. Vasco was not used in gears in previous Chinook models. In fact, this alloy has never been used in any critical aircraft application except these Chinook transmission gears. Boeing engineers participated in the development of the alloy and were painfully aware that it was exceptionally prone to manufacturing defects. Boeing knew that SPECO could not produce conforming Vasco X2-M gears. Boeing located representatives onsite at SPECO, wrote the manufacturing and inspection requirements, knew of problems with grinding burns and cracks on production parts, and knew that SPECO's inspection procedures failed to detect these defects.

Appendix at 1a-26a, and the cited passage appears at 3a-4a. For the Court's convenience, citation to the Sixth Circuit's decision will henceforth be to Petitioner's Appendix ("App.").

Boeing nonetheless installed SPECO gears into many Chinooks – including the one lost in Saudi Arabia – without any inspection of its own. At the same time, Boeing submitted claims for payment which represented to the United States that the helicopters complied fully with all contract requirements.

As a direct, proximate, and foreseeable result of Boeing's representations of conformance, the United States paid Boeing for the helicopters. Then, in reliance upon Boeing's representations of quality, conformance, and airworthiness, the Army flew the helicopters. Once a helicopter containing a cracked transmission gear was put into service, the catastrophic failure of that gear, destroyed helicopter and destroyed materiel were as foreseeable as sunset. The gear in the helicopter which crashed in the Saudi desert was a time bomb. So were the dozens of other defective SPECO gears which Boeing caused to be put into service. Once the gear failed and the helicopter was destroyed, the United States had to, and did, purchase another helicopter to replace it.

The Sixth Circuit correctly observed that "the Speco gear was not simply of lesser quality than specified; it was a defective flight-critical part, which made the loss of [the Saudi helicopter] inevitable." App. at 16a n.7. The panel concluded unanimously that a jury could find Boeing liable for the value of the Saudi Chinook as a means of making the United States "completely whole."[3] It also concluded, over a dissent, that a contractual clause known as the

[3] Boeing's seeming suggestion that the Sixth Circuit was "divided" on all issues before it is wrong. The panel's conclusion that False Claims Act damages can be measured by the value of a helicopter where its loss resulted from a defective flight-critical component part was unanimous; the panel divided 2-1 only on the issue of the HVIC. App. at 20a.

High Value Items Clause ("HVIC") did not confer upon Boeing immunity from the damage provisions of the False Claims Act. Boeing sought rehearing and rehearing *en banc*, which were denied. App. at 103a. This petition followed.

ARGUMENT

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE SIXTH CIRCUIT'S HVIC HOLDING, AND THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO RESHAPE THE FALSE CLAIMS ACT TO ACCOMMODATE PETITIONER'S COMMERCIAL INTERESTS.

A. The HVIC Is A Contract Term Which Has No Application To An Action Under The False Claims Act.

Boeing asserts that the High Value Items Clause represents a determination by the Department of Defense that it would self-insure for any and all damages resulting from injury to high-value items, no matter the cause. There is a disconnect between Boeing's position and the facts of this case so complete that Boeing has for years either missed it entirely, or been willing to dissemble completely.[4]

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[4] Boeing's claims regarding insurance are merely policy arguments reserved to coordinate branches. More importantly, the Settlement Agreement between Boeing and the United States specifically stipulated that "the exceptions to the High Value Items Clause . . . based on the Contractor having insurance . . . are not at issue." Settlement Agreement at App. 5, ¶ 2a. The question certified by the district court makes no mention whatever of insurance. The fact that Boeing focuses on these policy matters to the exclusion of reasoned analysis eloquently demonstrates that its legal position is bereft.

The fundamental issue is this: The HVIC is a contract clause. To the extent that it operates as a limitation of Government contractor liability, its application is, and could only be, limited to contract-based actions. This is made clear by the express terms of the HVIC itself: "(b) *High-value items.* In contracts requiring delivery of high-value items, the Government will relieve contractors of *contractual liability* for loss of or damages to those items."[5] This passage, which obviously is Boeing's Achilles heel, is studiously ignored in the Petitioner's papers for an obvious reason: This case is not about contractual liability at all.

Rather, this is a False Claims Act case. There is no dispute in the present posture of this matter that the damages which the United States and Relator sought flowed from Boeing's false claims for payment and attendant false certifications of contract conformance. There is, therefore, also no dispute that this case concerns statutory – not breach-of-contract – claims. The FCA provides for recovery against "[a]ny person who" with the requisite intent "submits a false claim for payment" to the United States (31 U.S.C. § 3729(a)(1)) and makes such person liable for all "damages caused by [its] act." 31 U.S.C. § 3729(a). There is, in other words, a manifest distinction between a violation of the FCA – that is, the submission of a false claim for payment – and the violation of law or other misconduct which underlies that violation.[6]

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[5] 48 C.F.R. 46.803 (1997 ed.) (emphasis supplied). This regulatory provision is no mere "policy statement," as Boeing argued in the court below. It is an integral part of the HVIC itself, promulgated by the DoD as the result of legislative rule making.

[6] Consider, for example, the decision in *M/G Transport Servs., Inc. v. Water Quality Ins. Syndicate*, 234 F.3d 974, 978 (6th Cir. 2000) that "[a]n FCA action is not converted into a Clean Water Act action simply because a violation of the Clean Water Act is a predicate to establishing

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Notwithstanding this easily-understood distinction, Boeing repeatedly asserts that the HVIC represents nothing less than a studied decision by the United States to "self-insure" against not only breach-of-contract claims, but also against every possible harm resulting from every conceivable type of fraud and abuse which occurs in the context of execution of a contract for end items that cost more than $100,000. Petition at 14-22. The argument, then, is that an executive-branch contract clause, which by its terms allocates breach-of-contract risk, immunizes the largest defense contractors, who perforce make the most expensive products purchased by the government, from precisely the types of misconduct addressed by Congress in the FCA.

Notably, Boeing nowhere suggests that the HVIC or documents discussing its history or purpose mention its supposed trumping of the FCA, although the latter preceded the former by about a century. Nor does Boeing point to so much as a sentence in the history of the 1986 FCA Amendments or their legislative history indicating that Congress recognized that really big contractors would be immune. The reason for these omissions is simple enough: The HVIC never mentions the FCA, and the FCA

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the falsity of the claim, or may be used as a measure of damages under the FCA." Here, the contract provisions set certain of the standards by which Boeing's conduct is measured. However, the contract is not the source of Boeing's liability. Nor is the basis for the action that the contract was breached. Rather the claim is that by knowingly delivering nonconforming helicopters while certifying their conformance, Boeing submitted false claims. Such conduct is precisely within the terms of the FCA, and simply has nothing to do with the HVIC.

never mentions the HVIC.[7] And when Congress did mention the big contractors, its intent was hardly to let them off the hook.[8]

That being so, Boeing's argument is necessarily reduced to one of repeal (or equally improbable, amendment) by implication – that is, that the HVIC is so broad that its drafters must have intended to expand its reach to Acts of Congress which would otherwise apply. This

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[7] The panel found this point telling, noting that under the HVIC, "The Government is both insurer and insured. Because nothing in the HVIC suggests that its limitation of contractor liability covers statutory violations, we hold that the district court did not err in concluding that the HVIC does not provide a defense to damages sought under the FCA." App. at 10a.

[8] The Senate Report pertinent to the 1986 Amendments observed that "while it may be difficult to estimate the exact magnitude of fraud in Federal programs and procurement, the recent proliferation of cases among some of the largest Government contractors indicates that the problem is severe." S. Rep. No. 345, 99th Cong. 2d Sess. at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269. The report continued:

> Fraud permeates generally *all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements*, to crop subsidies and disaster relief programs. While fraud is obviously not limited to any one Government agency, *defense procurement fraud has received heightened attention over the past few years.* In 1985, the Department of Defense Inspector General, Joseph Sherick, testified that *45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses.* Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors, General Electric, GTE, Rockwell and Gould, have been convicted of criminal offenses while another, General Dynamics, has been indicted and awaits trial.

Id. at 2-3, 1986 U.S.C.C.A.N. at 5267. (emphasis supplied; footnotes omitted). This language hardly supports the contention that the largest contractors are effectively immune from the FCA's grasp.

assertion is, of course, belied by the express language of the HVIC itself. It is also conspicuously inconsistent with this Court's recognition, as recently as this Term, that in the FCA, "Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Cook County v. United States ex rel. Chandler*, 538 U.S. ___, ___, 123 S. Ct. 1239, ___, 155 L. Ed. 2d 247, 256-257 (2003), *quoting United States v. Neifert-White Co.*, 390 U.S. 228, 232, 19 L. Ed. 2d 1061, 88 S. Ct. 959 (1968).[9]

While the HVIC is not an Act of Congress, Boeing's argument runs afoul, most fundamentally, of the basic proposition that even where two statutes may seem to conflict, "well-established law ... strongly disfavors preclusion of one federal statute by another absent express manifestations of preclusive intent." *United States v. Sforza*, 326 F.3d 107, ___, 2003 U.S. App. LEXIS 7149, *8-9) (2d Cir., April 10, 2003), *citing, inter alia, United States v. General Dynamics Corp.*, 19 F.3d 770, 774 (2d Cir. 1994), *citing in turn Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). This Court has long held that preclusion will be found only where there is clear congressional intent to preclude or "positive repugnancy" between the two statutes. *E.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992), *quoting Wood v. United States*, 16 Pet. 342, 363 (1842).

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[9] Even had the Department of Defense intended the HVIC to nullify FCA claims, and there is clearly no evidence to that effect, the DoD was powerless to do so. The Attorney General alone has authority to prosecute FCA offenses. 31 U.S.C. § 3730(a). This is consistent with the Contract Disputes Act, which gives the Attorney General (not the DoD) sole authority over false and fraudulent claims. 41 U.S.C. § 601 *et seq.*

Setting aside the dicey question whether executive rule-making could ever trump an Act of Congress, there is no inherent disharmony between the HVIC and the FCA – much less the sort of statutory cacophony which might lead to a finding of "positive repugnancy." Indeed, both *Sforza* and *General Dynamics* are directly instructive here: The *Sforza* panel recently held that the FCA is not precluded by the Federal Employee Compensation Act, 5 U.S.C. § 8101 *et seq.*, 326 F.3d at ___, 2003 U.S. App. LEXIS at *8-9. And the *General Dynamics* panel held that the False Claims Act is not precluded by the Anti-Kickback Act, 41 U.S.C. § 51 *et seq. General Dynamics*, 19 F.3d at 776-777.

In short, basic rules of construction confirm what common sense suggests: That a procurement regulation cannot credibly be argued to eviscerate an Act of Congress – much less one which it does not even mention. Indeed, the proposition that executive rule-making *sub silentio* insulated the largest contractors from answering for egregious misconduct is, standing alone, richly ironic. It is presumably Boeing's position that only small contractors in less vaunted positions than it should have to trouble themselves to answer for the submission of false or fraudulent claims against the Treasury, while the largest (and, according to Congress, most rapacious) contractors go about their business, beyond the reach of anti-fraud statutes.

As passing strange as Boeing's proposition is when standing alone, it is all the more so when considered against the history and purpose of the FCA. Boeing claims that the DoD, by including the HVIC in its contracts for expensive products, tacitly eviscerated what the Court knows to be "the very Act [Congress] passed to strengthen the Government's hand in fighting false claims." *Cook County*, 155 L. Ed. 2d at 260 (citation omitted). The result

could not be so. The HVIC and the FCA are ships passing miles apart on a foggy night.[10]

B. There Is No Split Of Authority Regarding The HVIC And The FCA.

Boeing posits disarray among the lower courts, asserting that even though the decisions appealed from were the first ever to examine the interplay between the FCA and the HVIC, the Sixth Circuit's decision implicates every "assumption of risk" clause promulgated by the Government – even though all that was ever put at issue was the HVIC. Then, Boeing identifies two cases that (while not dealing with the HVIC) concern limitations on the FCA in contexts much different than that pressed by Boeing in this case.

Boeing's claimed "conflicts" underscore the hollowness of its interpretation of the HVIC. In *United States v. United States Cartridge Co.*, 198 F.2d 456 (8th Cir. 1952), a contractor entered into a wartime procurement contract which made it an "instrumentality of the Government." 198 F.2d at 464. These circumstances dissuaded the court from voiding as against public policy a provision of the contract which waived all the contractor's liability to the government "of any kind whatsoever." *Id.*

The *Cartridge* panel carefully limited its holding to the facts before it, and cautioned against efforts to apply it more broadly:

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[10] Indeed, the case which Boeing identifies as the very DNA of the HVIC, *Australia v. Lockheed Aircraft Corp. & Menasco Mfg. Co.*, Civ. No. 69-1623-WPG (C.D. Cal. Jan. 10, 1972), Petition at 4, makes no mention of FCA liability. Rather, it pertained exclusively to issues of negligence and breach of warranty. These common-law claims have nothing to do with statutory FCA liability.

> If this contract were to be regarded as one creating the conventional relationship between the Government and a commercial corporate contractor not subject to Government supervision and control, for the supplying of goods or services, and if the provisions limiting liability were to be viewed merely as an attempt to relieve such a contractor for liability from its own fraud, the [public policy] argument might perhaps be unanswerable.

Id. Boeing ignores this passage, while spending several pages of its Petition vacillating between the assertion that the wartime-emergency finding was irrelevant to the *Cartridge* decision, and the even more peculiar argument that Boeing really is every bit the "instrumentality of the Government" envisioned by the Eighth Circuit.

These assertions are makeweight. In stark contrast with the facts of *Cartridge*, this litigation involves precisely the "conventional relationship between the Government and a commercial corporate contractor not subject to Government supervision and control." Boeing's helicopter contracts with the United States were indeed "conventional," and were no different from Government contracts for any number of expensive end items. The contracts were unaffected by wartime emergencies: They were let and mostly performed during the peace of the late 1980s. Boeing assuredly was not an "instrumentality of the Government."

The Sixth Circuit thus correctly distinguished *Cartridge* from this case, noting that the factual differences "suggest that the limitation of liability in *United States Cartridge Co.* allocated risks in a way much more favorable to the defendant than does the HVIC." App. at 12a. As it did below, Boeing claims that the "distinction is unavailing." Petition at 16. It argues that the HVIC is an "unqualified limitation-of-liability" clause that is now

included in nearly all Government contracts for high-value defense items, and that its application should not depend on the level of Government control over the contractor. Petition at 17. This argument is both circular (because it ignores the facts of the very case on which it relies) and based on a palpably-faulty premise: The HVIC is by its own terms not an "unqualified limitation-of-liability" clause. It applies only to contract-based claims. Moreover, the HVIC was not even at issue in *Cartridge* (since it was still 20 years away from promulgation). That case dealt with a unique type of Government assumption of risk clause in a unique contract involving an "instrumentality of the Government" tasked with producing ammunition to prosecute a World War. By its own terms, and despite Boeing's contrary assertions, *Cartridge* cannot be unmoored from its facts and broadly applied.

Perhaps recognizing this, Boeing makes a half-hearted stab at comparing its contracts with those in *Cartridge*. (Boeing lays the groundwork for this argument with its carefully distorted "Statement of the Case," which incorrectly paints Boeing as both victim of the acts of its chosen subcontractor and pawn subject to supposed "direction" from the Army). Boeing says that Government supervision of its contracts was "extensive and included the placement of numerous government quality assurance representatives and inspectors at both Speco and Boeing." Petition at 16 n.5. Boeing stops far short, though, of saying that it was somehow an "instrumentality of the Government."[11] The record – even as filtered through Boeing's

[11] In moving for *en banc* review of the Sixth Circuit's panel decision, Boeing was so concerned about the wartime/peacetime distinction in *Cartridge* – as well it should have been – that Boeing actually claimed that this country has been in something of a constant

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myopic lens – comes nowhere near to supporting such a claim.

In the end, Boeing's attempt to cloak itself in the mantle of *Cartridge* is painfully strained. The differences between the facts of that case and this one are so obvious that *Cartridge* merely demonstrates why the HVIC does not provide what Boeing wants – insulation from responsibility for violations of the FCA.

Finally, Boeing claims that the Sixth Circuit's HVIC decision "conflicts" with the Fourth Circuit's decision in *United States v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001). Boeing is again mistaken. *Bankers Insurance* did not address the HVIC or even any of the "assumption of risk" clauses that Boeing says are implicated by this case. Instead, it dealt with a mandatory arbitration contract clause, which had the effect of delaying – *not defeating* – a related FCA prosecution. *Id.* at 324. But in enforcing this clause, the Fourth Circuit acknowledged (as Boeing fails to do here) that the FCA was a "unique statutory right." *Id.* at 325. As such, the court noted that its ruling meant only a slight delay to the FCA prosecution, and thus did not dilute the Attorney General's ability to fully enforce the FCA – particularly since the results of the arbitration were not binding on the Government. *Id.* at 324.

In contrast, Boeing's interpretation of the HVIC would render the Attorney General forever precluded from prosecuting Boeing, or any other maker of expensive end items, for appropriate damages under the FCA. *Bankers Insurance* simply does not support this outcome. Indeed, *Bankers Insurance* quite explicitly narrowed its decision – just as did *Cartridge*, the other supposed "conflicting" case

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state of war over the past 60 years. Boeing wisely reconsidered this bit of silly hyperbole, and has chosen not to repeat that claim to this Court.

cited by Boeing – to the facts presented, and thus effectively foreclosed Boeing's current effort to extract a broadly applicable "ruling" from that case.

C. There Is No Support For Boeing's Policy Argument That Contractor Insurance Costs Will Be Affected By The Sixth Circuit's HVIC Ruling.

Many pages of Boeing's petition are consumed by cataclysmic predictions regarding the effect of the Sixth Circuit's HVIC opinion. In sum, Boeing claims that contractors who supply high-value end items to the Government have been relying on the HVIC for decades to shield them from FCA liability – and, as a result, "have foregone the purchase of insurance that would protect them against risk of damage or loss to high value government items." Petition at 19-22. Even more aggressively, Boeing says "it would be manifestly unfair" if the HVIC did not trump the FCA because "the government has avoided significantly higher procurement costs by inducing contractors and subcontractors to forgo the purchase of insurance through a promise of self-insurance." *Id.* at 20-21.

The biggest problem with such assertions is that there is no evidence that they are true. That is, there is no evidence that any Government contractor ever abstained from buying insurance for FCA liability in reliance on the HVIC. Boeing certainly cites none, hoping instead that its thesis gains credibility through repetition. In fact, though, there is clear proof that Boeing never really thought the HVIC saved it from FCA liability: Boeing itself actually had insurance for the FCA claims in this case to the extent that the HVIC did not apply.

Boeing's Chicken Little claims are wholly undercut by a lack of evidence and its own inconsistent behavior. While

Boeing may be correct that the HVIC is one of the Government's efforts to self-insure (at least in connection with breaches of contract), its claim that the Government meant the HVIC to cover *all* manner of loss caused by *all* manner of misconduct – even that which violates Acts of Congress that predate the clause by a century – is simply unsupported on the record. In any event, of course, these are policy concerns reserved to coördinate branches. As the Sixth Circuit noted: "In its brief, Boeing expounds at length on the negative implications, both fiscal and otherwise, of holding military contractors liable under the FCA for damages to high-value items. We agree with the Government and Roby that we should leave any revision of the FCA or the HVIC to Congress." App. at 13a. We respectfully urge this Court's concurrence.

II. THERE IS NO CONFLICT BETWEEN THE SIXTH CIRCUIT'S DAMAGES OPINION AND DECISIONS FROM THIS COURT OR OTHER CIRCUITS.

Regarding the measure of damages under the False Claims Act, Boeing's petition is based principally on its claim that the Sixth Circuit's decision "conflicts" with the Fifth Circuit in *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972). Boeing argues that *Aerodex* established a "rule" that FCA damages can never exceed the amount of the underlying false claim. Petition at 22. Boeing also asserts that the Sixth Circuit's decision is "out of step" (though apparently not in "conflict") with this Court's decisions in *United States v. Bornstein*, 423 U.S. 303 (1976) and *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). *Id.*

Boeing is wrong on both counts. Neither the Fifth Circuit in *Aerodex* nor any other court has either established or even hinted at a "rule" restricting FCA damages

in every case to the amount of the false claim. Indeed, *Hess* and *Bornstein*, far from discordant with this case, actually mandate a broad remedial approach to FCA damages so that the Government is made "completely whole." Since there is no Circuit (or any other) conflict, the petition should be denied.

A. Because Boeing Has Recast The Damage Issue On Appeal, The Petition Presents No Case Or Controversy: The Damage Issue Is Moot Because Boeing Concedes That The Government's Damages May Exceed The Value Of The Defective Flight-Critical Gear.

The district judge certified the following question at Boeing's request: "Whether the United States can recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part[.]" App. at 100a. In its Petition, Boeing has markedly rewritten the question:

> Whether the court below erred in holding, in conflict with the United States Court of Appeals for the Fifth Circuit, that damages recoverable under the False Claims Act, before trebling, are not limited "to the amount wrongfully paid to satisfy the false claim[.]"

Petition at (i). The certified question is amplified by the Settlement Agreement between Boeing and the United States, in which Boeing contracted to pay the reserved settlement amount upon a determination that the United States could recover "damages under the False Claims Act flowing from Boeing's claim(s) for payment for the Saudi helicopter that represent the value of the helicopter *(whether it be replacement value, fair market value, contract value or price, or some other measure)* ***rather than***

just the value of the defective gear[.] Settlement Agreement (attached) at App. 9, ¶ 2.h.i. (emphasis added).

Remarkably, the Petition nowhere addresses "the value of the defective gear." Rather, it argues that the Court should grant *certiorari* to decide whether Boeing's liability is limited to the value of "a claim for $4 million." Petition at 30. That Boeing has abandoned the remarkable suggestion that the Government's damage claim was limited to the approximately $10,000 price of the gear is hardly surprising, given Boeing's abandonment of that thesis before the Sixth Circuit[12] and the panel's dismissal of that position as nothing more than "[n]egotiation strategy."

The point, however, is not merely that Boeing's strategy has changed, but that the question presented to this Court is moot. The certified question, in contrast to Boeing's re-tooled version of it, has nothing to do with "the amount wrongfully paid to satisfy the false claim." Boeing's Petition makes no mention of the *price of the gear*; it focuses exclusively on the *value of the claim*. As a result, Boeing presents no question to this Court that would serve to resolve the underlying question before the Court (whether Boeing must pay the reserved settlement amounts), because no matter what answer the Court were to give to the question Boeing now presents, Boeing has conceded that the United States prevails on the certified question. The second question presented, therefore, fails to present a case or controversy, and is moot.

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[12] The panel observed that "Boeing now concedes that damages under the FCA could equal – but never exceed – the amount of the claim, which in this case would be the approximately $4.1 million value of Boeing's contract to remanufacture Aircraft 89-0165." App. at 15a.

B. Boeing Misapprehends FCA Damages Jurisprudence.

Should the Court be inclined to look past Boeing's attempt to completely rewrite the issue presented, it will find Boeing's analysis of False Claims Act damages incorrect. The text of the FCA provides for recovery of three times all "damages which the Government sustains because of the act" giving rise to liability. 31 U.S.C. § 3729(a). As this Court has held time and again over the years, the indisputable goal of FCA damages is to make the United States "completely whole." *Marcus*, 317 U.S. at 552; *Bornstein*, 423 U.S. at 314-15 (*quoting Hess*). Not two months ago, this Court reiterated that "make-whole" damages are an indispensable part of the FCA's broad remedial purpose. *Chandler*, 155 L. Ed. 2d at 258.

Determining proper "make-whole" damages depends on the facts of each case, and courts understand such an approach is not amenable to a one-size-fits-all damages construct. As the Eleventh Circuit said in an oft-quoted holding:

> No single rule can, or should be, stated for the determination of damages under the Act. . . . Fraudulent interference with the government's activities damages the government in numerous ways that vary from case to case. Accordingly, the committee believes that the courts should remain free to fashion measures of damages on a case by case basis. The Committee intends that the courts should be guided only by the principles that the United States' damages should be liberally measured to effectuate the remedial purposes of the Act and that the United States should be afforded a full and complete recovery of all its damages.

United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988) (*quoting* S. Rep. 615, 96th Cong., 2d Sess. at 4

(1982)).[13] This flexibility underlies the rulings in this case and, for that matter, in every case cited in the Petition. FCA damages are based on the facts, and courts rightly frame their inquiry in terms of causation – looking for a way to make the United States "completely whole" for all damage that directly, proximately and foreseeably occurs because of the FCA violation. No court has fashioned a "rule" that constrains this inquiry as a matter of law.

Yet that is exactly what Boeing advocates. Under its view, the FCA is only concerned with "recovering money the government was fraudulently induced to pay," which is capped by the amount of the false claim for payment. Petition at 25. This completely misstates the purpose of the FCA, which by its terms allows for recovery of all damages sustained "because of the act" that violates the statute. As relevant here, the prohibited "act" giving rise to Boeing's liability was its false claim that the Saudi Chinook conformed to all contract requirements. Because of that "act," the Army did more than satisfy the $4.1 million claim from Boeing; it also began flying a helicopter worth far more than $4.1 million which Boeing falsely – and knowingly – represented as flightworthy, but that was in fact doomed to crash after only a few hours of service. Restricting FCA damages as a matter of law to the amount paid on the claim would not make the United States "completely whole."[14]

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[13] Betraying a total failure to grasp this concept, Boeing actually justifies its petition by asking this Court to resolve the "lack of uniformity in the courts concerning the measure of damages under the FCA." Petition at 22. But this is exactly what the FCA demands – a case by case determination of damages. Boeing, understandably, wants a "rule" that reigns in its exposure for violating the FCA.

[14] This Court has recognized that making the Government "completely whole" includes consideration of amounts beyond the false claim

(Continued on following page)

Boeing's own damage analysis has fluctuated wildly as the litigation progressed. Before the district court, Boeing asserted that the "amount wrongfully paid" in connection with the destroyed Chinook was the cost of the defective gear – about $10,000. On appeal, Boeing advocated the same "amount wrongfully paid" position, but conceded that this amount could be the $4.1 million Boeing was paid to rebuild the doomed Chinook. The Sixth Circuit made quick work of this:

> Negotiation strategy aside, we are at a complete loss as to how Boeing can understand "the amount wrongfully paid" to be limited to "the portion of the contract price allocated to the defective gear." According to our reading of the contract and the subsequent invoice, Boeing billed the Government for the remanufactured helicopters as units, not as assemblages of assorted parts. The fact that every component but one conformed to contract requirements is not legally significant when the defective gear was "flight critical" and thus necessary for flight.

App. at 15a. In scrambling to limit its exposure, Boeing simply has not been able to coherently or consistently state its view of damages in this case.

Finally, Boeing tries to undercut the "make whole" language of *Hess* and *Bornstein* and *Chandler*, claiming that the *Hess* Court viewed the measure of double damages (now treble) as the mechanism to make the Government "whole," and was thus not addressing the concept of baseline actual damages. Petition at 23. But *Hess* simply did not make the distinction that Boeing urges, and the reason is obvious: doubling (or trebling) FCA damages will

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such as, for example, investigation costs. *United States v. Halper*, 490 U.S. 435, 442-46 (1989).

make the United States "completely whole" only if determining the appropriate level of baseline damages is part of the "make whole" analysis in the first place.

Indeed, Boeing's effort to undercut the "make whole" language masks the truly-disturbing truth of this case. The Government's total damages as a result of Boeing's misconduct with respect to the placement of exploding Vasco gears in Chinook helicopters is *hundreds of millions of dollars* in lost use of helicopters, repair, replacement, and inspection costs, investigation costs, litigation expense, and morale damage to the troops as a result of the knowledge that they are using equipment not just dangerous, but *unnecessarily* dangerous, and a loss of confidence in the integrity of the aircraft on the part of Army officials responsible for it. Boeing refuses to acknowledge the true measure of the damages it caused.

C. The Unanimous Sixth Circuit Damages Opinion Does Not Conflict With *Aerodex*, And Is Consistent With Precedent From This Court.

Boeing claims there is a Circuit split as to the proper measure of FCA damages because the Sixth Circuit's decision in this case "is in irreconcilable conflict" with a supposed "rule" established by the Fifth Circuit in *Aerodex*. Petition at 24. That "rule," according to Boeing, is that any damages beyond the "amount wrongfully paid" are by definition "consequential damages" and therefore never recoverable. There is no such "rule." Like all the other cases cited by Boeing, and consistent with the FCA text and the "make whole" nature of FCA damages, *Aerodex* simply decided an appropriate level of damages based on the facts presented.

While it is true that *Aerodex* is couched in terms of "consequential damages," close review demonstrates that

it actually is a case which centers around causation.[15] In deciding whether a defendant that shipped defective spare parts had to pay for the removal of those parts after they were installed by the Air Force without any inspection, the Fifth Circuit held that the defendant's violations of the FCA were not the cause of the removal-and-replacement expenses: "The submission of these [false] vouchers," said the court, "was not the cause of the government's consequential damages." *Id.* at 1011. Though the *Aerodex* court precluded the government from recovering (under the FCA) the cost of removing the defective parts, it probably did so because the Air Force was required to inspect the parts prior to installation but failed to do so. Such an inspection would have simply and cheaply revealed the defect in the parts. *Id.* at 1009. This failure readily can be seen as a break in the chain of causation – an intervening or "mediating" cause.

Here, the United States had no duty to tear down the helicopter Boeing sold it to inspect transmission gears, whether before or after delivery, and thus Boeing's attempt to shoehorn this case into the mold of *Aerodex*'s consequential-damage analysis is ill-conceived. *Aerodex* involved a manufacturer of component parts: Boeing is a manufacturer of helicopters. *Aerodex* involved delivery of individual components for later installation into airplanes: Boeing delivered helicopters which it certified as airworthy as delivered, requiring nothing more than a preflight check and a Chinook pilot's expertise.

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[15] Indeed, the Fifth Circuit itself has expressly characterized *Aerodex* as being a case which focuses on "the element of causation between the false statements and the loss." *United States v. Miller*, 645 F.2d 473, 476 (5th Cir. 1981).

Equally improper is Boeing's claim that the Sixth Circuit adopted a boundless "but for" test for determining appropriate FCA damages. Petition at 26. The phrase "but for" never appears in the Sixth Circuit's decision.[16] In truth, after considering the facts presented, the Sixth Circuit decided that the best method to make the United States "completely whole" was the "diminished-value" measure of FCA damages that Boeing itself advocated and this Court applied in *Bornstein*. App. at 18a. Since Boeing sold helicopters, not gears, the Sixth Circuit held that the Government could recover the difference between the market value of a helicopter delivered with a defective flight-critical gear ($0) and the value the entire aircraft "would have had if it had been of the specified quality[ ]" – a figure not identified because the court was only asked to decide whether such amount was a *candidate* for proper damages in this case. *Id.* at 18a. Thus, Boeing simply does not like how the Sixth Circuit *applied* the *Bornstein* measure of damages.

Boeing now says the Sixth Circuit improperly extended the *Bornstein* "rule," claiming that no other court has ever held that "a supplier of remanufacturing services

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[16] Having misstated the Sixth Circuit's holding, Boeing then claims that courts beyond *Aerodex* have "consistently rejected" the Sixth Circuit's "expansive" decision. Petition at 26. Interestingly, the only case Boeing cites, *United States v. Hibbs*, 568 F.2d 347 (3d Cir. 1977), actually undercuts Boeing's petition because its analysis is framed around causation. The Third Circuit reasoned that the connection between actual damage and the "act" of the defendant "compels consideration of the element of causation. *That requirement should be liberally construed so as to provide the government restitution from those whose fraud has caused loss.*" *Id.* at 351 (emphasis added). The *Hibbs* court also held that this inquiry requires consideration of "the relationship between the unlawful act and the injury ultimately sustained." *Id.*

and upgraded components could be liable under the FCA for three times the value of an entire aircraft if a single upgraded part is defective." Petition at 23.[17] The fact is, though, that no other court has ever been confronted with the situation at hand. That is, Boeing cannot demonstrate that the United States has ever before been the victim of a contractor who sold it an aircraft after failing to take steps to ensure that flight-critical parts had been manufactured free of defects, the risk of which the contractor specifically knew. Boeing's conduct in this case is so far from the mainstream of acceptable conduct that the fact there is no comparable case is hardly surprising. It proves nothing for Boeing to claim that the Sixth Circuit decision is "at odds with every court that has addressed these issues." *Id.* at 23. No court save the Sixth Circuit (and the District Court) has done so.

More to the point, Boeing is simply incorrect that *Bornstein* established a "rule" that the Sixth Circuit somehow ignored. Far from restricting the FCA, *Bornstein* actually reaffirmed the "make whole" measure of FCA damages. *Bornstein*, 423 U.S. at 314, *quoting Hess*, 317 U.S. at 551-552. As for its specific holding, there was no need for the *Bornstein* Court to address damage done to an end-item as a result of a defective component for an obvious reason: Nothing happened as the result of the sub-standard radio tubes because the Government detected the fraud before any adverse consequences arose.

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[17] Boeing also claims that the Sixth Circuit's application of *Bornstein* is "absurd" because the court set the market value of the defective helicopter at zero. Petition at 30 n.14. The Sixth Circuit was being generous. The value of a helicopter carrying American troops and equipment that will soon crash without warning and burn to the ground is, we respectfully submit, far less than zero.

Bornstein, 423 U.S. at 307. There is no indication whatever in that Court's opinion that, had the faulty tubes caused the radios to catch fire and burn to cinders as soon as they were turned on, their full value would not have been recoverable. In claiming the exact opposite, Boeing extracts a holding that just isn't there.[18]

Returning to *Aerodex*, Boeing argues that what it considers the "rule" of that case is the will of Congress. Petition at 26-28. This assertion does not withstand scrutiny. Congress did set out to reverse the consequential-damage language from *Aerodex* as a "narrow and form-bound interpretation" of the FCA, S. Rep. No. 345, 99th Cong., 2nd Sess. (1986) at 19, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5284, and the initial versions of the amended FCA thus did include a provision allowing for "consequential damages." Congress characterized "consequential damages" as follows:

> (1) For purposes of this section, consequential damages include damages which the United States would not have sustained but for –
>
> (A) the commission of any of the acts prohibited by subsection (a); or
>
> (B) entering into or making any contract or grant as a result, in any material part, of any false statement, record, or claim.

H.R. 4827, § 2, *reprinted in* 99 Cong. Rec. H6474 (Daily Ed. September 9, 1986).

This language was removed from the bill during the course of Conference Committee proceedings, and replaced

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[18] In fact, *Bornstein* actually allowed FCA damages that *exceeded the amount of the false claims*, 423 U.S. at 307, and thus Boeing's reliance on *Bornstein* for its "amount wrongfully paid" analysis is unfathomable.

with the language which now appears in the FCA – "three times the amount of damages which the Government sustains because of the act" of the defendant. 31 U.S.C. § 3729(a). The legislative history is silent with respect to the reasons for that removal. However, the extended remarks of an opponent of the draft provision are revealing in terms of understanding why the Conference Committee acted as it did:

> As reported by the committee, the definition of consequential damages is far too sweeping. From a fairness standpoint, *assessments of damages should be limited to those which were proximately caused by a prohibited act, and which were reasonably foreseeable.* Both of these concepts are well defined in the common law and, consequently, can be readily applied by the courts. In the absence of such limitations, persons may be subject to penalties based on highly speculative, attenuated and subjective considerations.

Extended remarks of Rep. Brown, *reprinted in* 99 Cong. Rec. H6474 (Daily Ed. September 9, 1986) (emphasis supplied). Representative Brown was the only Member to speak against the consequential damage language in the bill, and there is thus no better indication in the legislative record regarding why the compromise bill which emerged from the Conference did not include that provision. Rather, it appears a determination was made that while "consequential damages" should not be available under FCA treble damage remedies, the Act would be interpreted based on the well-understood concepts of proximate causation and foreseeability.

This interpretation simply makes good sense. It reconciles the problems which characterization and computation of "consequential damages" may pose, with the over-arching goal of the Act – to make the United States

"completely whole" for its losses. Thus, while *Aerodex* has become a talisman for the proposition that "consequential damages" are not recoverable under the 1986 Amendments, Boeing's suggestion that its precise holding has become the law of the land simply does not square with the cases.[19] To the contrary; the Second Circuit squarely held that consequential damages *are* recoverable under the False Claims Act in *General Dynamics*, 19 F.3d at 777, and other courts have without hesitation approved damage amounts exceeding contract price.[20]

Boeing suggests in closing that companies will stop doing business with the United States if this Court does not reverse the Sixth Circuit's ruling that Boeing could be held liable for the value of the helicopter. Petition at 30. Relator Brett Roby, who stood up for the principle that no contractor is above the law when he started this lawsuit almost ten years ago, respectfully submits that if Boeing truly understood the responsibilities it undertook when it signed its contracts with the United States, it would focus not on ending its relationship with the United States, but on reforming the practices which led to its submission of false claims to the United States. Had it done so before these helicopters were delivered, there would have been no dispute at all.

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[19] Indeed, Boeing points to no post-1986 court that has interpreted the consequential damage issue in a way which deprives the United States of the full measure of damages caused by the defendant's violations of the False Claims Act.

[20] *E.g., Commercial Contractors. Inc. v. United States*, 154 F.3d 1357, 1371-72 (Fed. Cir. 1998); *BMY-Combat Systems Division of Harsco Corporation v. United States*, 44 Fed.Cl. 141, 148 (Ct. Cl. 1998).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES B. HELMER, JR.*
FREDERICK M. MORGAN, JR.
ROBERT M. RICE
HELMER, MARTINS & MORGAN CO., LPA
105 East Fourth Street, Ste. 1900
Cincinnati, OH 45202
(513) 421-2400

MICHAEL A. HAVARD
PROVOST ★ UMPHREY
490 Park Street
Beaumont, TX 77704

Attorneys for Respondent
Relator Brett Roby

**Counsel of Record*

SETTLEMENT AGREEMENT

This Settlement Agreement ("Settlement Agreement") is made and entered into as of the 3rd day of August, 2000, by and between the United States of America, acting through the Civil Division of the Department of Justice ("United States"), and The Boeing Company ("Boeing"), a Delaware corporation (United States and Boeing being referred to herein collectively as "the Parties").

WHEREAS, an action entitled "*United States ex rel. Roby v. The Boeing Company*," now pending in the United States District Court for the Southern District of Ohio ("District Court"), Case No. C-1-95-375 (the "Speco Action"), was filed by Brett Roby, as relator on behalf of the United States ("Relator"), which made certain allegations of False Claims Act violations against Boeing;

WHEREAS, the United States intervened in the Speco Action and filed a First Amended Complaint against Boeing (the "Speco Complaint");

WHEREAS, an action entitled "*United States ex rel. Roby v. Litton Industries and The Boeing Company*," now pending in the United States District Court for the Southern District of Ohio, Case No. C-1-97-410 (the "Litton Action"), was filed under seal by Brett Roby as relator on behalf of the United States, which made certain allegations of False Claims Act violations against Boeing;

WHEREAS, the Relator has filed under seal a First Amended Complaint in the Litton Action (the "Litton Complaint");

WHEREAS, the United States has intervened in the Litton Action and filed a complaint asserting claims relating to the CH-47D 85-24332 mishap that occurred on

December 8, 1988 in Honduras ("United States' Litton Complaint"), and Boeing will, simultaneously with the execution of this Settlement Agreement, file its answer to the United States' Litton Complaint;

WHEREAS, the Litton Action, Litton Complaint, Speco Action, Speco Complaint, and United States' Litton Complaint (collectively "the Litton and Speco Actions and Complaints") include allegations of False Claims Act violations, common law fraud, breach of contract, unjust enrichment and payment by mistake claims in connection with the provision of Vasco X2M spiral bevel transmission gears under Boeing's contracts with the United States Army for new and remanufactured Chinook CH-47D and MH-47D/E helicopters;

WHEREAS, Boeing denies all the allegations advanced in the Speco and Litton Actions and Complaints and maintains that it did not submit false claims to the government or engage in any conduct in violation of law or of its contractual obligations as alleged in the Speco and Litton Actions and Complaints;

WHEREAS, the Parties now mutually desire to reach a resolution of the allegations and claims asserted by the United States in the Speco and Litton Actions and Complaints;

WHEREAS, the Parties now mutually wish to avoid to the greatest extent possible the expense, delay and inconvenience of protracted litigation but agree to preserve for appellate review certain issues relating to damages available under the False Claims Act and the applicability of the High-Value Items Clause to False Claims Act claims; and

WHEREAS, Boeing has expressed its willingness to enter into a contract modification intended to make it possible for the United States Army to replace in the Chinook CH-47D and MH-47D/E aircraft engine and combiner transmissions Vasco X2M spiral bevel gears manufactured by Speco Corporation during the period of about 1986 through 1995;

WHEREAS, simultaneously with the execution of this Settlement Agreement, Boeing and the United States Army have executed an Agreement and Release in which Boeing waives or releases its right to make certain claims pertaining to the more than $3,395,000 in costs that Boeing incurred or has agreed to incur as a result of the 1999-2000 reinspection and evaluation efforts by the Army and Boeing of the spherical raceways of Army-owned first- and second-stage planet gear/bearing assemblies.

NOW, THEREFORE, for an inconsideration of the mutual covenants, conditions and promises contained herein, the releases contained herein, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. *Contract Price Adjustment and Working Capital Fund Payment.* For purposes of settlement, concurrently with and as a condition to the execution of this Settlement Agreement, Boeing will enter into a contract modification covering the contracts with the United States Army set forth in Appendix A providing for an aggregate price adjustment pursuant to the contract modification to be made in the form of a check made payable to the Treasurer of the United States in the amount of $23,950,000 within five (5) days after the later of the Court's entry of the Order referred to in paragraphs 2(a) and (b) and the

Orders of dismissal referred to in paragraph 2(i). Additionally, Boeing will make a payment to the Department of Justice Working Capital Fund to be made in the form of a check payable to the Treasurer of the United States in the amount of $1,050,000 within five (5) days after the later of the Court's entry of the Order referred to in paragraphs 2(a) and (b) and the Orders of dismissal referred to in paragraph 2(i).

2. *Dismissal of Certain Claims and Further Relief Contingent On Resolution of Specified Issues on Appeal.*

a. Concurrent with execution and delivery of this Settlement Agreement, and conditional upon Boeing executing the contract modification set out in paragraph 1 above, the Parties will submit to the Court an agreed-upon proposed Order, attached hereto as Appendix B ("Order"), pursuant to which the District Court will certify for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) the Court's Orders of November 2, 1999 and December 30, 1999 and the order denying Boeing's Motion to Reconsider in Part the Court's Order of December 30, 1999, which will set forth the following two specific and exclusive issues of law (hereinafter the "Two Damages Issues"):

In August 1990, pursuant to a contract to remanufacture CH-47D helicopters for the Army, Boeing delivered a remanufactured CH-47D helicopter to the Army and submitted a claim(s) for payment to the Government for the re-manufactured helicopter. Between delivery and January 1991, the helicopter flew 56 flight hours. On January 11, 1991, a defective flight-critical transmission gear failed resulting in the helicopter being destroyed. A new CH-47D helicopter was purchased from Boeing to replace the destroyed helicopter.

Assuming arguendo that the necessary elements of the False Claims Act are satisfied, the following questions of law arise:

i. Whether the United States can recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part; and

ii. Whether the High-Value Items Clause contained in the Federal Acquisition Regulations § 52.246-24 and incorporated in the Boeing CH-47D helicopter contract operates as a defense to damages sought under the False Claims Act for the loss of or damage to a helicopter resulting from the failure of a defective component part.

The Parties agree that resolution of these two questions of law do not involve disputed issues of fact.

For purposes of this appeal only, the Parties agree that: i) the loss of the helicopter was the result of the failure of the defective flight-critical transmission gear; ii) they will not argue to the reviewing courts that there needs to be any additional fact-finding on the Two Damages Issues; iii) the exceptions to the High-Value Items Clause, found at F.A.R. § 52.246-24(b) and (c) (April 1984), based on the Contractor having insurance or there being willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel, are not at issue; iv) the version of the False Claims Act in effect at the date of this Settlement Agreement and the version of the High-Value Items Clause incorporated into the helicopter contracts, F.A.R. § 52.246-24 (April 1984), shall govern this appeal; and v) the

helicopter at issue is a high-value item under the High-Value Items Clause.

b. This settlement is contingent on the District Court issuing the proposed Order certifying the Two Damages Issues for appeal pursuant to 28 U.S.C. § 1292(b). Accordingly, if the District Court declines to enter the agreed upon Order, this Agreement is, and the contract modification identified herein shall be, null and void.

c. If the District Court enters the agreed upon Order, this settlement is contingent on the United States and the Relator supporting a Petition filed by The Boeing Company to the Sixth Circuit Court of Appeals, seeking review of the Two Damages Issues pursuant to 28 U.S.C. § 1292(b). If either the United States or the Relator fails to support the Petition for review, this Agreement is, and the contract modification identified herein shall be, null and void. The United States specifically hereby agrees to advise the Sixth Circuit that the two certified questions of law are important and controlling issues of law, and that appellate resolution of these questions on the merits will terminate the litigation. Once the Sixth Circuit accepts jurisdiction, the Parties agree to use their best efforts to obtain a ruling on the merits of the questions certified.

d. If the Sixth Circuit Court of Appeals declines to accept jurisdiction of the interlocutory appeal under § 1292(b), the matter shall be returned to the District Court for a trial limited to the False Claims Act claim in the Speco Complaint seeking damages for the CH-47D helicopter 89-00165 that was destroyed in Saudi Arabia on January 11, 1991 ("the Saudi Helicopter False Claims Act Claim"). Boeing agrees to waive any rights to any

offset, set-off, credit, or contribution for (1) any amounts received by the United States from Boeing under paragraph 1 of this Agreement; and any amounts, fees and expenses paid pursuant to 31 U.S.C. § 3730(d) related thereto; and (2) any amounts received by the United States from the Speco Corporation, or its estate, in the past, present, or future, for any damages awarded to the United States by a Court relating to the Saudi Helicopter False Claims Act Claim.

e. If the Sixth Circuit accepts review, the Parties agree as follows:

   i. If, at the completion of all appeals, Boeing is deemed to be the prevailing party as set forth in paragraph 2(h) below, the Saudi Helicopter False Claims Act Claim will be voluntarily dismissed by the United States with prejudice.

   ii. If, at the completion of all appeals, Boeing is not deemed to be the prevailing party, as set forth in paragraph 2(h) below, The Boeing Company, for purposes of settlement, agrees to enter into a similar contract modification with the United States Army, as required in paragraph 1 above, and using a then open contract(s) with Boeing chosen by the United States and providing for a price adjustment pursuant to the contract modification to be made in the form of a check made payable to the Treasurer of the United States in the amount of $14,430,000. Additionally Boeing will make a payment to the Department of Justice Working Capital Fund to be made in the form of a check payable to the Treasurer of the United States in the amount of $570,000. Said amounts will accrue interest

in accordance with Federal Acquisition Regulation 52.232-17 from the date the District Court enters the agreed upon Order identified in paragraphs 2(a) and (b). Upon payment of such amount, the Saudi helicopter False Claims Act Claim will be voluntarily dismissed by the United States with prejudice.

f. If the Sixth Circuit Court of Appeals accepts jurisdiction, but fails to decide on their merits the Two Damages Issues on appeal identified in paragraph 2(b) above, and no further appeal is taken, the matter shall be returned to the District Court for trial limited to the Saudi Helicopter False Claims Act Claim. If the Court of Appeals does not rule for Boeing on at least one of the Two Damages Issues on appeal and does not rule against Boeing on both of the Two Damages Issues on appeal, as set forth in paragraph 2(h) below, it will be deemed that the Court of Appeals did not decide the Two Damages Issues on appeal.

g. Either party may petition for writ of certiorari from the United States Supreme Court of any adverse ruling from the Sixth Circuit Court of Appeals. If the Writ is granted, the determination of whether Boeing is or is not the prevailing party in the Supreme Court will be determined in accordance with paragraph 2(h) below.

h. *Determination of the prevailing party.* For the purpose of determining whether Boeing is or is not the prevailing party under paragraphs 2(e), (f) and (g) above, the Parties agree as follows:

i. Boeing will be deemed the prevailing party if the Sixth Circuit (or if certiorari is granted, the Supreme Court) either (a) reverses the

District Court's Order of December 30, 1999 by holding on the legal issue that the United States cannot recover damages under the False Claims Act for loss of a helicopter resulting from the failure of a defective flight-critical component part, or that the United States cannot recover damages under the False Claims Act flowing from Boeing's claim(s) for payment for the Saudi helicopter that represent the value of the helicopter (whether it be replacement value, fair market value, contract value or price, or some other measure) rather than just the value of the defective gear; or (b) reverses the District Court's Order of November 2, 1999 by holding on the legal issue that the High-Value Items Clause operates as a defense to damages sought under the False Claims Act for the loss of or damage to a helicopter resulting from the failure of a defective component part.

ii. On any of the Two Damages Issues, taken and decided on the merits by the United States Supreme Court, the Supreme Court ruling shall control on that issue. On any of the Two Damages Issues, not taken or not decided, on the legal issues presented by the Supreme Court, the Sixth Circuit Court of Appeals' ruling shall control on that issue. If at the end of all appeals, any such combination of rulings by the Supreme Court and the Court of Appeals does not result in a ruling for Boeing on the merits in at least one of the Two Damages Issues, and does not result in a ruling against Boeing on the merits in both of the Two Damages Issues, as set forth in paragraph 2(f) above, the matter shall be

returned to the District Court for a trial limited to the Saudi Helicopter False Claims Act Claim.

iii. If, at the end of all appeals, the Parties cannot agree if Boeing has prevailed or not prevailed as set forth in this paragraph, the District Court for the Southern District of Ohio, Western Division, will retain jurisdiction: (1) to determine if Boeing has prevailed; (2) to determine if Boeing has not prevailed; or (3) to proceed with trial of the matter limited to the Saudi Helicopter False Claims Act Claim. The Parties retain the right to appeal that determination.

i. Concurrent with execution and delivery of this Settlement Agreement, and conditional upon Boeing executing the contract modification set out in paragraph 1 above and the District Court entering the proposed Order attached at Appendix B, the Parties will execute Stipulations and Orders providing for dismissal, with prejudice to the Relator, of all claims in the Litton Action and the Litton Complaint against all defendants, with prejudice to the Relator and the United States of all claims in the United States' Litton Complaint against all defendants, and with prejudice to the United States and the Relator of all claims in the Speco Action and in the Speco Complaint except for the Saudi Helicopter False Claims Act Claim, which Orders the Parties will request that the Court enter simultaneously with the proposed Order attached at Appendix B.

3. *Releases by United States*. Upon execution of this Agreement, the United States and its agencies, employees, representatives, and assigns ("the United States") hereby

waive, release, and promise to refrain from instituting, maintaining, or causing to be instituted or maintained

a. any civil action, claim, adjustment, set-off, or administrative monetary proceeding against Boeing, its past, present or future officers, directors, employees, agents, subsidiaries, affiliates (including but not limited to Boeing Precision Gear, Inc.), representatives, successors, or assigns, either in their corporate or personal capacities, and Litton Industries, Inc., its past, present, or future officers, directors, employees, agents, subsidiaries, affiliates (including but not limited to Litton Precision Gear), representatives, successors, or assigns, either in their corporate or personal capacities (collectively the "Releasees"), which the United States has or may have against Releasees under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, the Civil Major Fraud Act, 18 U.S.C. § 1031(h), the Civil Anti-Kickback Act, 41 U.S.C. § 55, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 *et seq.*, and under any common law or equitable theories including fraud, breach of contract, unjust enrichment or payment by mistake, for the conduct alleged by the United States in the United States' Litton Complaint including for the aircraft mishap at Honduras on December 8, 1988, and all such claims for the conduct alleged in the Speco Action and the Speco Complaint except for the Saudi Helicopter False Claims Act Claim;

b. any civil action, claim, adjustment, set-off, or administrative monetary proceeding against the Releasees which the United States has or may have against the Releasees under the False

Claims Act, 31 U.S.C. §§ 3729 *et seq.*, the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, the Civil Major Fraud Act, 18 U.S.C. § 1031(h), the Civil Anti-Kickback Act, 41 U.S.C. § 55, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 *et seq.*, and under any common law or equitable theories including fraud, breach of contract, unjust enrichment or payment by mistake, premised on any of the Vasco X2M spiral bevel gears, part numbers 145D5305, 145D5306, 145D6301 and 145D6302 manufactured through March 31, 2000, it being agreed that the release in this paragraph does not extend to a mishap, the cause of which is a part or parts other than any of the four part numbers identified in this paragraph;

c. any civil action, claim, adjustment, set-off, or administrative monetary proceeding against the Releasees which the United States has or may have against the Releasees under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, the Civil Major Fraud Act, 18 U.S.C. § 1031(h), the Civil Anti-Kickback Act, 41 U.S.C. § 55, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 *et seq.*, and under any common law or equitable theories including fraud, breach of contract, unjust enrichment or payment by mistake, premised on the allegation that Vasco X2M is an inherently unsafe or unsuitable material for use for the manufacture of CH-47 or MH-47 components, it being agreed that the release in this paragraph does not release the Releasees from any liability relating to the design (apart from material choice and the use of the material in conformity with the design), quality oversight, or manufacturing and processing of parts made of

Vasco X2M other than the claims released for the four parts identified in paragraph 3(b) and the claims released in paragraph 3(a).

4. *Exclusions*. The Parties agree that the following are excluded from this Settlement Agreement, the dismissal set forth in paragraph 2 above and the releases set forth in paragraph 3 above: (a) liability, if any, the Releasees have or may have for delivery of any deficient product or parts, or for breach of any express or implied warranty, including injury to persons and property, or any other claims the Parties may have regarding the contracts between them, excepting therefrom the claims released in paragraph 3 above; (b) any disputes or claims between the Parties arising under the Internal Revenue Code or Internal Revenue Service Regulations or under Securities or Environmental laws; (c) any administrative matter relating to the suspension or debarment by any federal agency of the Releasees; and (d) disputes and claims for the enforcement of this Settlement Agreement.

5. *Cost Allowability*. Boeing agrees that all costs, as defined by FAR § 31.205-47(a), incurred by, for, or on behalf of Boeing, its affiliates, subsidiaries, officers, directors, agents, representatives, and employees relating to (a) the matters covered by this Settlement Agreement; (b) the government's audit and investigation of the matters covered by this Settlement Agreement; (c) Boeing's investigation and defense of the matters and corrective actions if any; (d) the negotiation of this Settlement Agreement; (e) the amounts, fees and expenses paid pursuant to 31 U.S.C. § 3730(d) relating to the cases settled herein, (f) matters relating to the Boeing Releasees responding to the 1999 Department of Defense Inspector General subpoenas pertaining to planetary gears, and (g)

costs of the payments referred to in paragraphs 1 and 2(e)(ii) above, shall be treated as unallowable for government contract accounting purposes. These amounts shall be separately accounted for by Boeing by identification of costs incurred through (1) accounting records to the extent possible; (2) memorandum records including diaries and informal logs, where accounting records are not available; and (3) good faith itemized estimates, where no other accounting basis is reasonably available. Any such costs previously submitted or treated by Boeing as an allowable cost for government accounting purposes shall be withdrawn, and any charge or charges previously submitted that were based on such costs shall be adjusted accordingly, and any refund or credit due the United States as a result will be paid or given promptly.

6. *Federal Tax Deductibility*. Boeing further agrees that costs of the payments referred to in paragraphs 1 and 2(e)(ii) above will not be taken as a federal tax deduction by Boeing. Except for the foregoing, nothing in this Settlement Agreement is intended to characterize the federal tax deductibility of any other matter pertaining to this Settlement Agreement.

7. *No Admissions*. Nothing in this Settlement Agreement is intended to constitute an admission or finding of liability by any of the Releasees, each of which denies any fault or liability by it.

8. *Authority*. Boeing and the United States each warrant and represent that their representatives, whose signatures appear below, have the authority to execute this Settlement Agreement and to bind Boeing and the United States to every promise or covenant contained in this Settlement Agreement.

9. *Binding Upon Parties.* This Settlement Agreement will be binding upon and inure to the benefit of Boeing and the United States, and their employees, officers, agents, servants, attorneys, representatives, and, in the case of Boeing, its directors and shareholders. This Settlement Agreement will also inure to the benefit of Litton Industries, SKF U.S.A., Inc., and MRC Bearing Company. The Parties agree that the Settlement Agreement does not waive, compromise, or release any claims or causes of action against any other person or entity not identified in this Settlement Agreement.

10. *Counterparts.* The Parties have executed two identical copies of this Settlement Agreement, which may be executed in counterparts, each of which shall be deemed an original which will be fully enforceable.

11. *Changes.* The Parties agree that this Settlement Agreement may not be altered, amended, modified, or otherwise changed except by a writing duly executed by both Boeing and United States.

12. This Settlement Agreement shall be construed as if the Parties jointly prepared it and any uncertainty or ambiguity shall not be interpreted against any one Party.

13. This Settlement Agreement shall be interpreted in accordance with federal law. The District Court shall retain jurisdiction over this case for the purpose of resolving any disputes under the Settlement Agreement until such time as the Saudi Helicopter False Claims Act Claim is dismissed with prejudice pursuant to paragraphs 2(e)(i) or 2(e)(ii) above, or until any potential appeals pursuant to paragraph 2 above are exhausted and final judgment is entered on the Saudi Helicopter False Claims Act Claim.

IN WITNESS WHEREOF, this Settlement Agreement has been executed as of August 3, 2000 the date first above written.

THE UNITED STATES OF AMERICA:

By /s/ Dennis L. Phillips

Date August 3, 2000

U.S. Department of Justice
Attorney for the Plaintiff United States

THE BOEING COMPANY:

By /s/ John W. Wallace

Date August 3, 2000